Supreme Court, U.S.
FILED
JUL 30 1997
CLERK

No. 96-2015

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

REPLY BRIEF FOR THE PETITIONER

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Respondents' Brief in Opposition ("Opp.") is noteworthy in that it fails to contest, and thus effectively concedes, several key issues that are dispositive to the resolution of this case. Specifically, respondents do not deny the obvious fact that the Louisiana court's decision, if allowed to stand, will eviscerate the exclusive administrative remedy established by the Service Contract Act (the "SCA") or that this important unresolved question warrants the Court's review. As noted in our petition, few plaintiffs indeed will pursue administrative remedies when penalty damages amounting to 24 times actual damages are available under state law. The result will be a maze of inconsistent state remedies that will undermine the congressional policies of uniformity, efficiency of administration and well-defined remedies codified in the SCA's exclusive remedial regime. Given that the Louisiana court's decision would directly undermine the structure, purpose and balance of the SCA, it is clear that the state remedies at issue here must yield to the SCA under well-settled principles of preemption and exclusivity.

Despite these major concessions, respondents do advance several specific arguments that warrant a brief reply.

1. Respondents acknowledge that the SCA preempts state law claims that are based on violations of the statute. Opp. 17. Nevertheless, respondents seek to avoid the consequences of this straightforward proposition by placing artificial constraints on the scope of the SCA. Respondents suggest that the SCA applies only to cases involving *underpayment* of prevailing wages as opposed to *nonpayment* of such wages. Opp. 15 n.1, 24. As noted in the petition, Petition ("Pet.") 10 n.2, the distinction urged

by respondents and adopted by the court below has no basis in the SCA and would make no sense since an employee is underpaid by any amount that the employee is not paid. Not surprisingly, the regulations confirm that the SCA protects employees of service contractors against "underpayments (which includes *nonpayment*)." 29 C.F.R. § 4.187 (emphasis added).

Respondents also contend that the SCA has no application to their claims because the dispute here relates to *who* must pay the prevailing wages, rather than what wages are owed. This is, of course, merely a restatement of the argument that the SCA does not cover instances of nonpayment because disputes as to the identity of the employer necessarily involve nonpayment – employers who contend they are not responsible for amounts due under the SCA presumably will not have made any payments at all to their employees as to the disputed sums. Beyond the regulations cited above, respondents' own conduct, namely the filing of a complaint with the Department of Labor, demonstrates that the SCA applies to such disputes.[1]

The plain language of the SCA also confirms that the Act clearly governs this dispute. The Louisiana statute here plainly requires a "person employing such laborer or other employee to pay the amount then due under the

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[1] Although respondents may not have been represented by counsel at the time the complaint was filed, this fact merely suggests that they followed the plain meaning of the statute and only filed suit in state court when their attorneys pointed out the possibility of recovering 24 times their actual damages under state law. *See* Opp. 15.

terms of employment" within three days of termination. Pet. App. 28. Thus, in order to resolve this state law dispute, the state court must determine both *which* "person" employed respondents and the amount due them. Both of these determinations fall within the scope of the SCA. The proper identity of the employer responsible for payment of SCA wages is plainly covered by the Act and the Act plainly authorizes the Department of Labor to resolve such disputes. 41 U.S.C. § 354. And, of course, the Department of Labor did resolve this dispute between petitioner and its assignee. It is equally obvious that the amount due under the contract is a determination for the Department. Thus, respondents' claims do not require the state court merely to look to a calendar, Opp. 22, but require the court to interpret a contract governed by the SCA and to determine the entity responsible for wages under that statute.

Thus, the issue in the Louisiana state proceedings falls within the substantive scope of the SCA as does a dispute over wage amounts – which all agree would be preempted. Allowing such state law claims poses the same dangers of erasing the Labor Department's exclusive enforcement role and creating potentially inconsistent judgments. Under respondents' view, for example, no deference is owed to determinations made by the Department of Labor as to the proper identity of the employer owing SCA wages. If this view were to prevail, a conflict might well arise between the determination made by the state court and the Department of Labor as to which party actually owed the sums due the

employees. Indeed, under this theory nothing would prevent petitioner on remand from contesting its responsibility for SCA wages in state court despite the Department of Labor's ruling to the contrary.

In sum, respondents concede that at least some disputes under the SCA fall exclusively within the jurisdiction of the Department of Labor, but fail to acknowledge that their claims, which clearly arise under the SCA, are preempted. To the extent respondent is attempting to create certain subclasses among SCA claims, some of which may only be resolved by the Department and others of which may be asserted under state law as well, this result is equally without merit. Respondents fail to identify any support in either the statute itself or in logic that would justify this anomalous and unworkable result. Indeed, the congressional policies of promoting uniformity of relief and efficiency in administration with a minimum of litigation apply with equal force to all disputes arising under the SCA.

2. Respondents simply ignore this Court's precedents which make clear that the SCA preempts Louisiana law. *See, e.g.*, Pet. 22-26. Specifically, respondents do not contest that the Louisiana statute is preempted both because it impermissibly establishes "a multiplicity of tribunals" to resolve disputes arising under the SCA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959), and because it "interfere[s] with Congress' integrated scheme of regulation by adding a remedy to those prescribed by [an exclusive remedial scheme.]" *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287 (1986) (internal citations omitted). Rather, respondents argue that the state statute cannot be preempted absent a clear

statement that Congress intended the SCA to have such preemptive effect. Opp. 7 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). This unduly narrow understanding of this Court's preemption cases is, of course, inconsistent with respondents' own concession that the SCA has preemptive force as to disputes over prevailing wage disputes. Opp. 17. Moreover, respondents' reliance on *Cipollone* is misplaced since the clear statement rule applies only in express preemption cases and has no application where preemption is implied from the structure and purpose of the Act.

Respondents contend that the Louisiana court's decision is consistent with the purpose of the SCA because it "penalizes" employers for nonpayment of wages and fringe benefits. But the fact that the Louisiana law "penalizes" the employer with sanctions beyond those authorized by the SCA confirms, rather than refutes, its inconsistency with the Act. Excessive additional state penalties inherently vitiate the exclusive nature of the SCA's remedial scheme and would disrupt the delicate balance struck by Congress in enacting the SCA and similar statutes.[2] Indeed, this very point is established by the case upon which respondents primarily rely. This Court has explained that Congress, in enacting the Davis-Bacon Act, which concededly served as the model for the SCA, was well-aware of the concerns of contractors that

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[2] As noted in the petition, the SCA is one of over 55 similar statutes that mirror the Davis-Bacon Act's requirement that employees of federal contractors receive wages prevailing in their locality.

they would be "put to unexpected expense by post-contract terminations" if an administrative enforcement mechanism were not established. *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 775 (1981); Opp. 13. Both the Davis-Bacon Act and its successor acts, such as the SCA, "carefully balance[ ] the interests of contractors and their employees." *Id.* The administrative enforcement mechanism established by these statutes allows a contractor to "know definitely in advance of submitting his bid what his approximate labor costs will be" and thus ensures that contractors will not have to "submit inflated bids to take into account the possibility that they would have to pay wages higher than those set forth in the specifications." *Id.* at 782-83 (internal citations omitted). If employees were allowed to circumvent this enforcement regime by pursuing their claims for violations of the SCA and similar acts in state court, federal contractors would be confronted with the very type of uncertainty that Congress intended to foreclose by establishing an exclusive remedial regime.

Additionally, this Court has made clear that the goal of these exclusive enforcement mechanisms was "to introduce consistency into the administration and enforcement of the Act and related statutes." *Id.* at 783. The Court has acknowledged the obvious fact that "[t]he uniformity fostered by [this regime] would be short-lived if courts were free to make postcontract coverage rulings." *Id.* In short, the important congressional purposes of uniformity and certainty that are inherent in an exclusive administrative enforcement regime will be eviscerated if the Louisiana court's decision is allowed to stand. Moreover, there is no principled basis to limit such a ruling to

the context of the SCA, and thus the decision below could logically be extended to each of the other statutes that perform a similar function as the SCA. Such a result "would be so inconsistent with the legislative scheme underlying the right [to a minimum prevailing wage] as to be unthinkable." *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1227 (D.C. Cir. 1991). Thus, a state law which *increases* the monetary remedies properly owed by an employer under the SCA is no more "consistent" with the Act than a law which *decreases* such remedies, to the detriment of employees.

3. In a last-ditch effort to avoid the preemptive effect of the SCA, respondents cite several cases acknowledging that other *federal* statutes are "mutually supplemental" to the SCA. Respondents contend that state law that is "supplemental" to the SCA should also not be preempted. At the most rudimentary level, respondents' contention is correct insofar as the SCA does not preempt state laws that fall outside its scope. Thus, employees of federal service contractors may bring suit under state civil rights laws for unlawful discrimination since such actions do not infringe on the exclusive remedial jurisdiction of the Department of Labor. It is equally obvious that Congress has passed statutes that regulate other aspects of the employment relationship between federal service contractors and their employees. And, as the Fourth Circuit has recognized, some such federal statutes are directly intended to supplement the substantive provisions of the SCA. *See, e.g., Masters v. Maryland Management Co.*, 493 F.2d 1329 (4th Cir. 1974). The Fourth Circuit's conclusion that the Fair Labor Standards Act complements the SCA is hardly surprising since Congress

in the legislative history of the SCA clearly manifested its intent for both statutes to act in concert to insure that employees of federal contractors receive a minimum wage. *See, e.g.*, Revision Notes in Legislative Reports, 41 U.S.C. § 351. Thus, *Masters* merely stands for the unremarkable proposition that Congress has passed several federal labor laws that act to complement and reinforce one another.

As the D.C. Circuit made clear in *Danielsen*, however, even federal laws that are inconsistent with the SCA's exclusive remedial scheme will be "preempted" or, more precisely, rendered inoperative as to SCA claims. 941 F.2d at 1226-27. Under respondents' theory, however, *state* laws that directly infringe on the Department's exclusive remedial authority should not be preempted and thus should be afforded greater vitality and scope than analogous federal statutes. In *Danielsen* the court held that the federal courts cannot resolve disputes that were entrusted to the Department of Labor under the SCA. Yet, the exclusive enforcement mechanism under the SCA would be more greatly disrupted by permitting inconsistent state laws than by allowing federal courts to grant a private right of action under the Act. If the decision below were allowed to stand, there would be 50 different forums adjudicating such disputes pursuant to many different substantive standards and remedies. As the extravagant penalty damages sought by respondents demonstrate, there is enormous potential for conflicting substantive results under such a regime. Surely, such a method for enforcing the SCA is anathema to the congressional purpose embodied in the Act's exclusive administrative remedy.

Finally, respondents' argument fails even on its own terms because the state law they invoke would not truly "supplement" the SCA, but rather would supplant it. As previously noted, few plaintiffs will pursue the SCA's administrative remedy when penalty damages and attorneys' fees are available under state law. Beyond the deleterious practical consequences of such an enforcement regime, even the cases relied on by respondents clearly reject attempts "to circumvent the SCA's administrative scheme by essentially labeling their prevailing wage rate and holiday claims as arising under [other statutes]." *Brown v. Luk, Inc.*, No. 95-CV-1780, 1996 WL 280831, *4 (N.D.N.Y. May 10, 1996). In rejecting "such a maneuver," *id.*, the lower courts have followed this Court's admonition that a plaintiff may not evade an exclusive remedial scheme " 'by the simple expedient of putting a different label on (the) pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)).

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 29, 1997